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No. 88-

In The

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
Petitioner,

v.

DONALD R. PARKER, *et al.*,
Respondents.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

FREDERICK D. COOKE, JR.
Corporation Counsel, D.C.

*CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division

DONNA M. MURASKY,
Assistant Corporation Counsel, D.C.

Attorneys for Petitioner
Room 305, District Building
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7039

DONALD R. PARKER, *et al.*

v.

DISTRICT OF COLUMBIA, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 83-03382)

Argued November 16, 1987

Decided June 17, 1988

Donna M. Murasky, Assistant Corporation Counsel, D.C., with whom *Frederick D. Cooke, Jr.*, Acting Corporation Counsel, D.C., and *Charles L. Reischel*, Deputy Corporation Counsel, D.C. were on the brief for appellant.

William W. Taylor, III, with whom *Roger E. Zuckerman* and *Christine Nicholson* were on the brief for appel-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

lees. *Michael R. Smith* also entered an appearance for appellees.

Before: MIKVA and WILLIAMS, *Circuit Judges*, and GORDON, **Senior District Judge.*

Opinion for the Court filed by *Senior District Judge* GORDON.

Dissenting Opinion filed by *Circuit Judge* WILLIAMS.

GORDON, Senior District Judge: Don R. Parker sustained serious injuries after being shot by an officer of the District of Columbia metropolitan police department Repeat Offenders Project [ROP]. This is an appeal from a judgment based upon a jury verdict that awarded Mr. Parker $425,046.67 in damages and nominal loss of consortium damages to his wife, Betty. The Parkers sued the District of Columbia and the ROP officers involved; they alleged state law assault and battery and violations of 42 U.S.C. § 1983 arising out the District's failure adequately to train, discipline and supervise its ROP officers in matters of extrajurisdictional arrest and disarmament. Prior to trial, the Parkers dropped their claims against the individual officers and proceeded only against the District.

At the close of all the evidence in the trial, the court denied the District's motion for a directed verdict. The case went to the jury, which found in favor of the District on the state law claims, but against the District with respect to the section 1983 claim. The District moved for judgment notwithstanding the verdict, but the court denied this motion. The District now challenges the court's ruling on the motion for judgment n.o.v. and aspects of the charge tendered to the jury. For the reasons set forth below, we affirm.

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* Of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S.C. § 294(d).

I. Background

This case is the result of confusion and a series of mistakes leading to tragic consequences. On the morning of November 15, 1982, two ROP officers, William Hayes and Ronnie Motley, set out to locate Don Parker, for whom an armed robbery felony warrant was outstanding.

To begin their search, the officers traveled to suburban Maryland in plain clothes and in an unmarked car, a 1974 Pontiac station wagon. There they intended to interview Betty Parker. The officers did not bring the Parker warrant because they mistakenly assumed that their arrest authority in Maryland was curtailed and that Don and Betty Parker did not live togther. When they arrived at the Parker address, they unsuccessfully attempted to contact their dispatcher by radio. Unfortunately, the officers were parked in a radio "dead spot," and they could not communicate with the ROP.

When the officers went to the door and identified themselves to Ms. Parker, she brought Mr. Parker to the door. Mr. Parker invited the officers into the house. The officers described the purpose of their visit and requested that Mr. Parker voluntarily accompany them to the D.C. police department. Mr. Parker denied any wrongdoing; indeed, the armed robbery charge was eventually dropped. Mr. Parker also refused to leave with the two men who were not in possession of a warrant. Because his phone was disconnected, Mr. Parker asked the officers to radio either the local police or their ROP supervisors regarding the warrant, but the officers' dead radio barred that procedure. Finally, Mr. Parker ostensibly agreed to accompany the officers but asked for the opportunity to change his clothes. Officers Hayes and Motley granted this request; Mr. Parker went into his bedroom and escaped through the window into the neighboring woods.

Once the officers realized that they had been duped, they jumped into their station wagon and chased Mr. Parker around the surrounding neighborhood. To escape,

Mr. Parker commandeered a late model Volvo, one that had just careened into the rear end of the officers wagon. Officer Hayes rushed out of his vehicle and tried to extricate Mr. Parker from the Volvo, but he was unable to accomplish this task. Operating under the erroneous assumption that Mr. Parker was threatening the driver of the car and that he was armed, Officer Hayes yelled: "Freeze Parker, don't do it." Transcript at 200. Mr. Parker continued to turn towards Officer Hayes, and the officer shot at him four times. Don Parker was hit twice, once in the abdomen and once in the spine, causing serious and permanent injury.

II. Analysis

A. *Standard of Review*

In reviewing Judge Green's ruling on judgment n.o.v., we apply the standard applied when reviewing directed verdict rulings. *See Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). A directed verdict or judgment n.o.v. is inappropriate unless there is only one reasonable conclusion to be drawn from the evidence and that conclusion is inconsistent with the verdict rendered. *Morgan v. District of Columbia*, 824 F.2d 1049, 1056 (D.C. Cir. 1987). Our task on review is not to weigh or reconsider the evidence.

> [W]e are required to evaluate the evidence under the presumption that the jury resolved all factual disputes in favor of the prevailing party. Moreover, we must give the advantage of every fair and reasonable inference to the prevailing party. Finally, we may not assess the credibility of the witnesses; that function is reserved exclusively for the jury. Our function is limited to cerifying "only that fair-minded jurors could reach the verdict rendered."

Id. (quoting *Grogan v. General Maintenance Service Co.*, 763 F.2d 444, 447 (D.C. Cir. 1985)).

Despite strong factual underpinnings and clear precedent to the contrary, the District is, in effect, urging us to impose a less onerous standard for overturning jury awards in municipal liability cases under 42 U.S.C. § 1983. As the *Morgan* opinion illustrates with eloquent detail, jury awards are always "given the utmost of deference and respect." *Id.* at 1056. There is no authority to veer from this standard in cases involving awards against municipalities; we decline to adopt the District's implied suggestion to do so.

Our colleague's dissent is primarily based on his own interpretation of the facts, which is contrary to that of the jury. In our view, the dissent is seriously flawed by its failure to apply the "utmost . . . deference" standard referred to above.

B. *Substantive Law*

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978), the Supreme Court held that a municipality is liable under 42 U.S.C. § 1983 only when execution of its policy or custom causes a plaintiff to suffer constitutional injury. Since *Monell*, the Court has continued to explore the contours of municipal liability under § 1983. In a case involving a police shooting allegedly caused by inadequate training, the Court determined that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985).

The District contends that inadequate training cannot amount to a custom or policy giving rise to liability under 42 U.S.C. § 1983 as required by *Monell* and that even if it could, the Parkers' proof does not support a

finding of such a custom or policy. We disagree. Unlike *Tuttle*, this case does not involve a single incident that gives rise to an inference of inadequate training. It involves a sad series of mishaps linked to a policy of sorely deficient training, supervision and discipline.

Although the Supreme Court has not yet resolved the question, the issue of whether liability can arise for injuries caused by a policy of inadequate training has come to the attention of the Court. *See City of Springfield v. Kibbe*, 107 S.Ct. 1114 (1987); *Tuttle*, *supra*, 471 U.S. at 814 n.2. In *Kibbe*, for example, the Court originally granted certiorari to address the question of inadequate training and liability under *Monell*, but dismissed such certiorari as improvidently granted upon determining that the petitioner failed to preserve the "fairly included" question, *see* Supreme Court Rule 21.1 (a), of whether more than negligence in training is required in order to establish such liability.

In *Tuttle*, the Court rejected a finding of § 1983 municipal liability for inadequate training based on a single incident of police misconduct. Whether the facts of a particular case could contain sufficient examples of misconduct to infer a policy of inadequate training was a question left unresolved by *Tuttle*. The Supreme Court has, however, recently accepted for review the sixth circuit case of *City of Canton v. Harris*; the issue of inadequate training for law enforcement officers and its relationship to municipal policy would appear intrinsic to that case. *See City of Canton v. Harris*, No. 85-3314, slip op. (6th Cir. Sept. 5, 1986), *cert. granted*, 108 S.Ct. 1105 (1988) (No. 86-1088).

Until we receive contrary direction from the Court, we believe that section 1983 liability may be found under *Monell* when there is evidence of deliberate indifference manifest by systemic and grossly inadequate training, discipline, and supervision. We also believe that the

standard articulated in the instruction proffered to the jury in this case reflects a proper standard. Limiting *Monell* to affirmative policies that violate constitutional protections is not necessary; the "policy or custom" language of *Monell* warrants no such conclusion. *See generally* Note, *Municipal Liability for Police Misconduct: Must Victims Now Prove Intent?*, 97 Yale L.J. 448 (1988).

As another panel of this court recognized in *Carter v. District of Columbia*, 795 F.2d 116, 122 (D.C. Cir. 1986), "[p]olice misconduct cases such as this one . . . do not involve express statements of policy. . . . To succeed, a plaintiff must show a course deliberately pursued by the city. . . ." To establish the existence of a *Monell* pattern or policy, a plaintiff must present "concentrated, fully packed, precisely delineated scenarios." *Id.* at 125.

Thus, we uphold the district court's conclusion that liability may be imposed on a municipality upon a showing of deliberate indifference exhibited by a pattern of inadequate training, supervision and discipline of police officers provided there is a causal connection between such inadequacies and the risk of harm to others. *Accord, e.g., Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 752 (1988); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 326 (2d Cir. 1986) ("deliberate indifference"), *cert. denied*, 107 S.Ct. 1384 (1987); *Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986); *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) (so grossly negligent as to constitute "deliberate indifference").

The incidents giving rise to the case at bar present the requisite "fully packed" scenario. Inadequately trained officers—in terms of both arrest procedure and physical aptitude—committed a series of mistakes resulting in serious injuries to an innocent man. There were

no consequent sanctions or even reprimands. From these facts, a clear pattern of inadequate police training and discipline emerges.

C. *Specific Challenges*

The District challenges the jury's determination on two grounds. First, the District contends that the evidence was not sufficient to establish inadequacies in training, discipline or supervision. Second, the District claims that even if some such deficiencies were established, they were not the "moving force" behind Mr. Parker's injuries because Mr. Parker's own actions were superseding causes. Both of the District's challenges go to factual issues which were before the jury, and we will not disturb its findings in this case.

We find that there is ample evidence in the record to support the jury's finding of deliberate indifference to adequate training, supervision and discipline. For instance, Roy C. McLaren, Chief of Police at Miramar, Florida and co-author of *Police Administration*, a widely used police textbook, testified as an expert regarding the ROP's training in extrajurisdictional arrest procedures. In Chief McLaren's opinion the ROP officers lacked sufficient knowledge in this area.

> A: Although the outline for the training consists of one week of instruction, the amount of instruction given to the officers, from what I can gather from looking at the reports and depositions and the responses made by the officers, the actual instruction given to them for some of the activities that they had to confront was inadequate.
>
> Q: And in what way was it inadequate, Chief McLaren?
>
> A: It failed to cover the circumstances that they would confront in making an arrest or a detention in Maryland, in Prince Georges County or in the State of Maryland, or in any outside jurisdiction out-

> side of the District, and it did not give instructions on how to remain in contact with headquarters and guidance on what to do in the event that that contact was lost, in the event that they could not maintain radio contact or telephone contact with their supervisors.
>
> And it did not clarify the authority that the officers would have in making an arrest or a detention on an individual outside of the District of Columbia.

Transcript at 677-678.

Indeed, the officers' training regarding extrajurisdictional arrest authority consisted of a single memo by the head of the ROP, Edward Spurlock. Mr. Spurlock's memo failed to disclose that the ROP was authorized to arrest suspects in Maryland in circumstances like those leading up to the shooting underlying this case.

We have considered also the record evidence on Officer Hayes' general physical training and, specifically, his disarmament training and believe that it too illustrates deliberate indifference to adequate training. Charles W. Bates, a security consultant and former F.B.I. agent, testified as an expert regarding Officer Hayes' disarmament training. Agent Bates described, and eventually demonstrated on the Parkers' counsel, how Officer Hayes could have subdued Mr. Parker without use of deadly force. *See* Transcript 281-285. According to Agent Bates, Officer Hayes' failure physically to subdue Mr. Parker evidenced a serious deficiency in the officer's training program.

It is undisputed that Officer Hayes had no physical training for four years prior to the Parker incident. Indeed, he was off duty because of a fractured shoulder until just two months before the incident that gave rise to this lawsuit. Given Officer Hayes' physical condition, it is not hard to fathom that his most effective method for subduing the objects of his pursuits would be the use of

a firearm as opposed to the application of physical force. Officer Hayes simply was not in adequate physical shape. This condition posed a foreseeable risk of harm to others. We are persuaded that a fair-minded jury could have concluded that Officer Hayes' conduct was the result of deliberate indifference on the part of the District with respect to the physical training of its police officers.

As to the inadequacies of its discipline and supervision, a telling example is the District's failure to take any disciplinary action whatsoever with respect to Officer Hayes. Assistant Police Chief Theodore Carr, the administrative officer responsible for reviewing cases involving alleged misconduct, determined that Officer Hayes mishandled the Parker incident and should have been "recycled through the firearms training course so that any—so he can be refreshed in terms of policies and procedures." Transcript at 920. Despite this internal order, no such action was ever taken.

We turn now to the District's challenge to the jury's finding on causation. As the District correctly points out, a municipal policy must be the "moving force" behind the alleged constitutional violation before a plaintiff may recover under section 1983. *Tuttle, supra,* 471 U.S. at 820. In this circuit, a municipal policy is deemed to be the moving force of a constitutional injury if the

> conduct is a substantial factor in bringing about harm. . . . The defendant may be held liable for harm that is "foreseeably attributable" to his conduct as well as for unforeseeable harm attributable to his conduct, unless it appears that the chain of events is "highly extraordinary in retrospect."

Morgan, supra, 824 F.2d at 1062-63 (quoting *White v. United States,* 780 F.2d 97, 106 (D.C. Cir. 1986)) (citation omitted).

We can easily conclude that the record supports the jury's determination that the District officers' deficient

training was a substantial factor in bringing about Mr. Parker's injuries. The unreasonable use of deadly force was an immediate cause of such harm. Officer Hayes shot at Mr. Parker four times. He resorted to use of his gun because he was unable physically to subdue Mr. Parker by less drastic means; his physical condition was deficient because the District was deliberately indifferent to his physical training program.

Moreover, the record adequately supports the finding that the officers' misunderstanding of their extrajurisdictional authority caused the underlying confused atmosphere. Chief McLaren articulated the nature and dangers associated with such confusion. He testified that "[t]he confusion may introduce uncertainty in the mind of the person that they are confronting so that in fact, a person being confronted in the field by a police officer . . . may act differently than the person would have had that element of confusion not been there." Transcript at 682. The record establishes a "substantial factor" relationship between the officers' uncertainties and Mr. Parker's reaction. Considered together with Officer Hayes' lack of physical conditioning and disarmament training, the circumstances giving rise to Mr. Parker's injuries persuade us that the moving force element of *Monell* is satisfied.

To bolster its moving force argument, the District attempts to analogize this case to *Cameron v. City of Pontiac*, 813 F.2d 782 (6th Cir. 1987). In the latter case, the plaintiff filed a cause of action under 42 U.S.C. § 1983 alleging that a Pontiac police officer's unreasonable use of deadly force caused her husband's death; he was hit by a truck when he ran across a highway in an attempt to escape from a city police officer. The court of appeals for the sixth circuit upheld the trial court's determination that the plaintiff's death was "completely independent" of the application of deadly force by the defendant's employee-police officer.

The District contends that *Cameron* is similar to the case at bar. Accordingly, the District urges us to adopt the *Cameron* court's reasoning and reject the existence of a causal connection between Officer Hayes' conduct and Mr. Parker's injuries. We disagree. The chain of events leading to Mr. Cameron's death was "highly extraordinary in retrospect." *Morgan, supra*, 813 F.2d at 1063. "[Mr. Cameron] was killed when he, at his own election, ran onto a high speed freeway. The district court was correct in concluding that this was unforeseeable, and that it would be an absurd result indeed to permit recovery for a felon's unwise choice of an escape route." *Cameron, supra*, 813 F.2d at 786

Unlike Mr. Cameron, Mr. Parker was not injured when he was run over by a truck passing coincidentally along his escape route, he was seriously injured when the plain-clothed police officer, who did not possess an arrest warrant, chased him and shot at him. The connection between Officer Hayes' actions and Donald Parker's injuries can readily be found to be direct and causal whereas the connection described in the *Cameron* case is far more attenuated and non-causal. We conclude that the jury's verdict on this issue is not unreasonable.

D. *Jury Instructions*

The defendant also contends that reversal is warranted by the trial court's decision not to charge the jury regarding use of deadly force according to the language set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985). In that case the Supreme Court held as follows:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not unconstitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the

> infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12.

Before the jury was instructed, the parties argued about the contents of the charge to be submitted to the jury. At that time, the District advocated the use of an instruction that included language quoted from *Tennessee v. Garner*, contending that the District's official policy is consistent with this language.

What the District's *official* policy consists of is not the issue here and is not properly the basis of a jury charge. That Officer Hayes may have believed that he was being threatened, and that he did, in fact, issue an oral warning to Mr. Parker to "freeze," does not dispose of this aspect of the appeal. The jury was charged with evaluating the adequacy of District police training, supervision and discipline with regard to the use of deadly weapons rather than investigating the official weapons policy of Officer Hayes and the District. The jury arrived at its verdict upon a consideration of the actual customs and policies of the ROP. For this reason, we deem Judge Green's instructions on the use of excessive force, although not comprehensive, to be sufficient to convey the law of this fact-bound case.

Furthermore, the District failed properly to preserve its objection on this matter. The District requested the giving of a *Garner* instruction and Judge Green denied this request. In so doing, Judge Green commented that the District's request, and its underlying interpretation of *Garner*, could constitute interesting issues for appeal. Judge Green's comments, however, did not preserve the issue for appeal. Rule 51, Federal Rules of Civil Procedure, sets forth the procedure for effectively preserving challenges to jury instructions: "No party may assign as

error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*" *Id.* (emphasis added). The District failed to adhere to Rule 51; it neglected to state distinctly its specific objections to Judge Green's charge before the jury retired to deliberate. Absent such specified objection, it would be overreaching for this court to reject the instructions and to upset the jury's verdict.

The current posture of this case distinguishes it from a recent decision in which the Supreme Court did not require strict compliance with the requirements of Rule 51. In *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988), the court declined to dismiss a challenge to a jury verdict imposing municipal liability despite the petitioner's failure timely and properly to preserve its objection to a portion of the underlying jury instruction. The Court found that dismissal subsequent to its decision to grant certiorari would "undermine the policy of judicial efficiency that underlies Rule 51." *Id.* at 922. By contrast, policies of judicial efficiency and finality of judgments require us, at this relatively early stage of the appellate review process, to adhere to the clear directives of Rule 51. In any event, we are convinced that the instructions presented to the jury did not contain any flaws which rise to the level necessary to constitute plain error.

Therefore, we affirm the judgment of the district court.

WILLIAMS, *Circuit Judge*, dissenting: A seasoned District of Columbia police officer grappled with a bank robbery suspect who was attempting to hijack an innocent woman's car and—as she happened to be in it—kidnap the woman. The suspect slipped from the policeman's grasp and thrust his right hand toward his waistband. The officer drew his service revolver and ordered the suspect to halt. The suspect did not heed the warning; his right hand obscured from view, he turned toward the policeman. The police officer had only a millisecond in which to act. Believing that his life and the life of the innocent woman were in immediate peril, he fired four times in quick succession. The suspect, who had not been armed after all, fell to the ground a paraplegic.

With the benefit of hindsight it is now clear that the officer need not have shot the suspect. But the jury, informed of the officer's vantage point at the time of the shooting, found his actions not unreasonable; it rejected the plaintiff-suspect's assault and battery claim against the District. However, perhaps out of sympathy for the victim, the very same jury found the District liable under 42 U.S.C. § 1983 (1982). § 1983 provides for a damage action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . .

Parker's § 1983 theory argued that the District's inadequate training of its police force deprived him of his Fourth Amendment right not to be seized with unreasonable force. *See Tennessee v. Garner*, 471 U.S. 1 (1985).

The District moved for a judgment N.O.V., which the trial court denied. The majority affirms, with an opinion nominally accepting the view that municipalities may be

liable under § 1983 for inadequate police training only if the acting officer's violation stemmed directly from municipal policymakers' "deliberate indifference" to such violations. The court's words are equivalent to those employed in other circuits. *See, e.g., Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) (liability may be found where city pursues police training so defective that "the municipality exhibits a deliberate indifference to the resulting violations of a citizen's constitutional rights" (internal quotations omitted)). Its application of the standard, however, drains the words of any constraining force. Accordingly, and fully recognizing that a lengthy dissent based the probative value of specific evidence "is seldom worth writing or reading," *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1239 (D.C. Cir. 1984) (Scalia, J., dissenting), I must set out my quite different view of the evidence. The majority also dismisses the District's well-founded objection to the trial court's erroneous charge on the constitutional limits on the use of deadly force. I dissent on that issue as well.

I. Background

To support its outcome in this case, the majority paints a distorted portrait of the police officer whose actions are at issue, unnecessarily maligning him in the process. *See, e.g.*, Maj. Op. at 9-10. Although many of the facts surrounding the shooting of Donald Parker are in dispute, Officer William Hayes's record and qualifications are not. A highly-decorated army helicopter pilot and Vietnam combat veteran, Hayes joined the Washington metropolitan police force in 1971. Testimony of Hayes, Tr. 1671-90. In his first six years on the force his duties ranged widely. He worked as an undercover agent infiltrating and investigating the Black Panther Party, and did stints in the homicide, civil disturbance and special operations divisions. *Id.* at 1690-1715. During his time in special operations he was essentially a member of a

SWAT team, *id.* at 1708, and received intensive training in numerous law enforcement skills, including hostage negotiations, riot control, and disarming armed and dangerous suspects. *Id.* at 1703-10. His performance on the street was extraordinary. He participated in over 200 arrests, *id.* at 1711, earned more than a dozen commendations, *id.* at 1722, and on at least three occasions single-handedly arrested armed felons, *id.* at 1722-25. With the exception of the incident central to this case, and of course in practice at the firing range, Hayes never found it necessary to discharge his service revolver. *Id.*

In 1982 Hayes applied for a position in the District's new repeat offenders project ("ROP"), a special police unit created to focus on suspects who were believed to be committing a disproportionate number of crimes in the District. In April, he was hand-picked from a field of about 500 applicants to be one of 88 ROP operatives. Testimony of Inspector Spurlock, Tr. 1532-35. Before hitting the streets, each ROP officer completed a specially designed, intensive one-week training program.

On the morning of November 15, 1982, Hayes and his partner, Ronnie Lee Motley, were instructed to find out the whereabouts of Donald Parker. Parker was believed to have participated with Charles "Dusty Face" Johnson in an armed robbery of a pharmacy, and there was a warrant out for his arrest. Before starting the search, Hayes checked Parker's file, and learned that Parker had several arrests and prior convictions for, among other offenses, armed robbery and carrying a pistol without a license. Testimony of Hayes, Tr. 1742. Parker was currently on parole for armed robbery of a bank. *Id.*

After pursuing what turned out to be a bum lead, Officer Hayes and Motley were instructed, by radio, to proceed to the home of a woman who was believed to be Parker's estranged common-law wife to see if she could help them locate Parker. When they arrived at Mrs.

Parker's residence in Oxon Hill, a Maryland suburb of the District, the officers attempted to reach their dispatcher, but found that they could not; they were apparently in a "dead spot"—a place where a physical obstruction prevents the transmission of readable radio signals. Testimony of Motley, Tr. 368-71. The officers approached the door and knocked; Mrs. Parker appeared at a window. The officers identified themselves as District police officers. They then asked whether she would be willing to answer a few questions. Without replying, Mrs. Parker withdrew from view. Soon Donald Parker, whom Hayes recognized from his photograph, appeared at the window. The officers once again identified themselves and informed Parker that they were there to investigate a criminal matter involving him. Parker invited the officers in.

Once inside, the officers noticed the presence of two small children. Testimony of Hayes, Tr. 1773-74. Unsure of his extrajurisdictional arrest authority and sensitive to the potential for violence or a hostage situation within the home, Testimony of Hayes, Tr. 1773-74, Hayes told Parker of the outstanding warrant for his arrest and attempted to persuade him to voluntarily accompany them to the station. Parker denied participation in the crime,[1] and refused to accompany the officers unless they could produce a warrant. As the officers were on an investigative mission and had not expected to find and confront Parker, they didn't have the warrant with them. The officers then suggested alternatives: Parker could call an attorney to meet him at the station, *id.* at 1776, or allow the officers to phone the Prince George's County police to effect the arrest, *id.* at 1773. But neither option was

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[1] Hayes later testified that Parker, after being informed that his alleged co-suspect was Dusty Face Johnson, claimed to be on the outs with Dusty Face, having recently shot his alleged accomplice five or six times in a dispute over money. Testimony of Hayes, Tr. 1775.

possible; Parker said his phone was disconnected. *Id.* at 1776. The police, for their part, refused to leave without their quarry. Stalemate. Eventually Parker agreed to accompany the officers so long as they would first permit him to dress. The officers agreed and allowed him to go to his bedroom. A couple of minutes later, Hayes noticed the dining room curtain move. *Id.* at 1786. He looked out the window in time to see Parker leap to the ground from his bedroom window ledge. *Id.* Hayes and Motley ran for the door, and the chase was on.

Motley pursued Parker on foot through a nearby wooded area. Hayes returned to the car and drove it to the spot where Parker and Motley had entered the woods. Parker, having circled back, emerged from the woods and ran, hands waving, towards Hayes's car. Hayes stopped the car and began to open the door. Testimony of Hayes, Tr. 1794. Upon recognizing Hayes as the driver, Parker turned and ran in the opposite direction. *Id.* at 1795. As Hayes stepped out of his car to give chase, it was rear-ended by a Volvo (driven by Desrine Rainford), Testimony of Motley, Tr. 345; Testimony of Hayes, Tr. 1795, and knocked into a roadside ditch. Parker ran to the driver's side of the Volvo, opened the door, shoved Rainford aside, and leaped into the car, half onto Rainford's lap. Testimony of Rainford, Tr. 889-90, 893; Testimony of Hayes, Tr. 1796.

When Hayes approached the car, he saw Parker's foot near the accelerator and his right hand on the steering wheel. Fearing a hijack and hostage-taking, he ordered Parker to halt. Parker refused, saying "F—— you. I gonna . . . ." Testimony of Hayes, Tr. 1797. Hayes grabbed Parker, lifting him from the automobile. *Id.* at 1800. But Parker somehow managed to yank himself from Hayes's grasp and put his right foot back in the car. *Id.* at 1801. When Hayes tried again to extract Parker from the car, he saw Parker's right hand move towards his waistband. *Id.* at 1805. (Parker may have

so gestured because Ms. Rainford had just poured her cup of tea on his crotch. Testimony of Rainford, Tr. 894). Believing that Parker was reaching for a gun, Hayes stepped back and drew his service revolver, yelling "Freeze, Parker, don't do it." *Id.* at 1803. His right hand still obscured by his body, Parker began to turn toward Hayes. *Id.* at 1804. Hayes was familiar with Parker's history of weapons offenses and had reason to believe that Parker had shot Dusty Face five or six times over money. *Id.* at 1805. In the split second in which he had to make a decision, Hayes thought that Parker was armed and that Parker posed an immediate threat to his life and Ms. Rainford's. *Id.* at 1806. Hayes discharged his revolver four times in quick succession, hitting Parker twice. Parker, who, as it turned out, had not been armed, slumped across the automobile door, staggered a few steps and fell.

One of Hayes's bullets lodged in Parker's spine. As a result of the shooting Parker is now a paraplegic. It is clear, in retrospect, that neither Rainford's nor Hayes's life was in imminent peril. Parker was needlessly crippled. The question before this court, however, is not whether Hayes actually needed to shoot Parker. Rather, the issues are first, whether the jury was properly instructed, and second, whether even a properly instructed jury could reasonably find that the District pursued a police training program so defective as to manifest "deliberate indifference" to the risk of constitutional violations by its police force, and that such defects caused Parker's injury.

This dissent will first analyse the error in jury instructions. It will then review the origins of the "deliberate indifference" standard and the reasons for drawing a rigorous distinction between it and mere negligence. Finally, it will review the evidence in light of that standard.

II. Errors in the Jury Instruction

To find the District liable under § 1983, the jury had first to find that Hayes violated Parker's Fourth Amendment right to be free of unreasonable seizures. *Tennessee v. Garner*, 471 U.S. 1 (1985). Parker introduced expert testimony that it is unreasonable for an officer to shoot until he has actually seen a weapon. Although this testimony was properly before the jury in reference to Parker's common-law claims, McLaren's concept of acceptable police conduct conflicts with and is more stringent than the governing Fourth Amendment standard. In *Garner*, the Court held that it is not unreasonable for a police officer to use deadly force when he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." 471 U.S. at 11. Regardless of its relative merits as a matter of police policy, McLaren's standard is clearly more demanding than the Supreme Court's test; it makes actual sight of the weapon essential and thus precludes any reliance on circumstantial evidence. Thus the jury could not properly consider McLaren's standard in its decision as to whether Hayes violated Parker's Fourth Amendment rights.

To prevent the jury from adopting McLaren's standard as its constitutional benchmark, the District requested the district court to instruct the jury in terms of *Garner*'s definition of constitutionally permissible use of deadly force. Before the court charged the jury, the District's counsel reviewed Judge Green's proposed instructions and requested that she add "at least the second paragraph of [its] proposed instruction No. 4." Tr. 2196. This paragraph reads, in part, as follows: "Under the fourth amendment, it is constitutional for a police officer to use deadly force in apprehending a suspect, if he has probable cause, that is a reasonable belief that the suspect poses a threat of serious physical harm, either to the officer or to others." Judge Green noted the District's

objection to the existing instructions, but refused to so alter them. Tr. 2196-97. In view of the drastic gap between the law under *Garner* and McLaren's testimony, as well as the confusion manifested by the jury's inconsistent verdicts (see pp. 27-28 & n.3 below), the error was far from harmless.

The majority dismisses the error with the claim that the District "failed to adhere to Rule 51 . . . [when] it neglected to state distinctly its specific objections to Judge Green's charge before the jury retired to deliberate." Maj. Op. at 14. But in fact Judge Green explicitly stated, just before the jury retired, that the parties should state only *new* objections to the instructions as given, as she considered the objections made in the previous day's colloquy already preserved for the record. Tr. 2230-31. I cannot grasp why the court now faults the District for having refrained from a repetition that would have defied the judge's instructions and likely have been contemptuous. To do so is not to preserve orderly trial procedures but to invite their disruption.

As the jury may well have found the predicate constitutional violation using an invalid standard, its § 1983 verdict should not stand.

The instructions included a second critical error, this one on the standard applicable to the District itself:

> The burden is on the plaintiff, Don Parker, to establish by a preponderance of the evidence that the District of Columbia failed adequately to train, supervise and discipline Officers Hayes and Motley and that this failure constitutes gross reckless and gross indifference to the civil rights of Mr. Parker *in that such inadequate training, supervision and discipline would involve a risk of harm to others.*

Tr. 2222 (emphasis added). The italicized portion of this instruction implies that a finding of gross recklessness or gross indifference is called for once the jury deter-

mines that the training was "inadequate" in any way that would "involve a risk to others." Not even an "unreasonable risk! This suggested a standard even lower than one of common-law negligence, essentially one of strict liability. Such low-level "inadequacies" plainly do not reflect the "deliberate indifference" to constitutional violations that all members of the panel agree is the correct standard (explained in detail in part III).

Had the District properly objected to this conception of § 1983 liability and then raised the matter before us, it would require reversal. Had it merely raised the matter for the first time on appeal, I would find plain error. *Cf. Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 469 n.1 (D.C. Cir. 1987) (acknowledging uncertainty as to whether this circuit recognizes the "plain error" doctrine in civil cases). In fact it did neither. Although *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983), wisely counsels that we should normally not address unbriefed issues, it does so on the premise that we would otherwise be deprived "of that assistance of counsel which the system assumes." *Id.* As we need no such assistance on the point, I think it an independent ground of reversal.

In any event, the *Garner* error calls for reversal of the judgment and remand for a new trial.

III. The "Deliberate Indifference" Standard

As the majority and I agree that a municipality should be liable under § 1983 for unconstitutional acts resulting from inadequate police training only if its training policies reflect "deliberate indifference" to those violations, it may seem pointless to argue the legal standard. But it is facts that give words their meaning. In China after Mao, it is said that many parroted the slogan attributing the country's ills to the "Gang of Four," but simultaneously held up a hand with five fingers outstretched--

an extra one for the Great Helmsman himself. Here the majority talks deliberate indifference, but I can fathom their belief that the facts satisfy that standard only as a product of their reluctance to acknowledge the policies restricting municipal liability under § 1983. I write to underscore the force of those policies and the reasoning behind the requirement of deliberate indifference.

In *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that cities and other local governing bodies are "persons" subject to liability under § 1983, overruling its decision to the contrary in *Monroe v. Pape*, 365 U.S. 167 (1961). But it explicitly rejected the idea of *vicarious* municipal liability. *Id.* at 690-95. Rather, the Court accepted liability only where "execution of a government's policy or custom . . . inflicts the injury," *id.* at 694, or (in a formulation seemingly intended as identical) where "official policy" has been "the moving force of the constitutional violation," *id.*; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n.8 (1985) (reiterating the "moving force" metaphor and condemning "loose language in the charge leaving it to the jury to determine whether the alleged inadequate training would likely lead to 'police misconduct' "); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981).

For reasons that will soon be apparent, § 1983 liability for egregiously defective police training is compatible with *Monell*'s requirement of a municipal policy; the other circuits facing the issue since *Monell* have so found. The majority's statement of the law appears to coincide with their views. Under this consensus, a municipality's inadequate training of police can give rise to liability under § 1983 if (1) the training is so grossly negligent or reckless as to reflect deliberate indifference to the constitutional violations that will inevitably result, and (2) the inadequate training is the moving force behind a violation of a plaintiff's constitutional rights. *See* cases

cited at Maj. Op. at 7; *see also Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.) ("so reckless or grossly negligent that future police misconduct is almost inevitable . . ., or would properly be characterized as substantially certain to result") (citations omitted), *cert. denied*, 459 U.S. 833 (1982); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) (deliberate indifference or tacit authorization); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir. 1981) (simple negligence not sufficient), *cert. denied*, 456 U.S. 979 (1982).

Liability for deliberate indifference serves as a backstop to liability for *explicit* municipal authorization of § 1983 violations. Without it, municipal policymakers could wink at rampant police misconduct but keep the municipal treasury safe. Of course where plaintiffs could prove the wink, the resulting violations would be chargeable to the city as explicit policy. But proof of a wink may fail for no fault of the plaintiff, and on a strong enough record the fact-finder should be able to infer tacit complicity.

Grounding liability for deliberate indifference in a backstop function finds support in *Monell*'s discussion of the inclusion in § 1983 of "customs" and "usages" among the state prescriptions under "color" of which the forbidden deprivation may occur. The Court quoted Justice Harlan's point in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970), that custom and usage were included "because of the persistent and widespread discriminatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *See Monell*, 436 U.S. at 691. Just as including state involvement through discriminatory practice prevents evasion through, as it were, government body language, so liability for deliberate indifference prevents evasion through a calculated

municipal failure to cure training defects with a hi and obvious probability of generating excessive constit tional violations.

The backstop role surely requires no more expansi a standard than that of deliberate indifference. The que tion remains whether a reasonable construction of § 19 and *Monell* suggests more. Of course Congress's ma target in adopting the predecessor of § 1983 was t Klansmen's brutalization of the freedmen. Although Co gress obviously provided a remedy against broader evil *cf. Monell*, 436 U.S. at 683, it would be startling to fir it evolve into a basis for federalizing (and judicializing the complex political issue of how to reduce the impe fections of municipal government.

The Court's language in *Monell* appears to refer onl to policy decisions that can be linked by *intention* to th resulting constitutional violations. The Court held, pe Justice Brennan, that "[l]ocal governing bodies . . . ca be sued directly under § 1983 . . . where . . . the actio that is alleged to be unconstitutional *implements* or *exe cutes*" a governmental policy. 436 U.S. at 690 (emphasi added). The words "implement" and "execute" surely connote a direct and intentional link between the policy and the unconstitutional outcome. Police officers' consti tutional infringements do not "implement" or "execute' a sloppy training policy. *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 n.11 (1986) (noting that both the plurality and concurrence in *Tuttle* "found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant to* a municipal policy" (emphasis in original)).

Certainly the subsequent opinions of the justices provide little support for any more expansive liability. The Court came closest to addressing the issue explicitly in *City of Springfield v. Kibbe*, 107 S. Ct. 1114 (1987), but a five-justice majority (Justices Brennan, Marshall,

Blackmun, Stevens and Scalia) dismissed the writ as improvidently granted; the defendant city's petition for certiorari had not objected to the jury instruction permitting liability on the basis of *gross* negligence. Those who dissented evidently regarded that instruction as too lax. Writing for herself and Chief Justice Rehnquist and Justices White and Powell, Justice O'Connor took the position that " 'inadequacy' of police training may serve as the basis for § 1983 liability *only* where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain." 107 S. Ct. at 1121 (O'Connor, J., dissenting).

The *Kibbe* dissenters identified an inherent hazard in imposing § 1983 liability for municipal policies that do not *compel* a constitutional violation. Because of the confusion arising from intervening causes, even a nominally stringent causation requirement could not prevent damage judgments based on illegitimate jury conjecture:

> [A]t the time of the officers' alleged misconduct, any number of other factors [may have also been] in operation that were equally likely to contribute or play a predominant part in bringing about the constitutional injury: the disposition of the individual officers, the extent of their experience with similar incidents, . . . and so forth. To conclude, in a particular instance, that omissions in a municipal training program constituted the 'moving force' in bringing about the officer's unconstitutional conduct, notwithstanding the large number of intervening causes also at work up to the time of the constitutional harm, appears to be largely a matter of speculation and conjecture.

107 S. Ct. 1114, 1120-21 (1987).

But the expressions of the justices composing the *Kibbe* majority hardly suggest a readiness to find liability much more readily. As we have noted already,

Justice Brennan's opinion for the Court in *Monell* itself found liability where an unconstitutional act "implements or executes" municipal policy, language strongly suggesting deliberate intent. He also noted that some congressional supporters of § 1983 had made clear that they intended the Act to reach situations where "officers of the State were *deliberately indifferent* to the rights of black citizens." 436 U.S. at 685-86 n.45 (emphasis added). In *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), where the majority overturned a judgment against a municipality because the charge allowed the jury to infer " 'gross negligence' or 'deliberate indifference' " from a non-policymaker's single excessive use of force, *id.* at 821, he concurred, and, writing for himself and Justices Marshall and Blackmun,[2] observed that the plaintiff "bore the burden . . . of proving" that his injuries resulted from " 'conscious choices' . . . made by the city concerning police training and supervision," *id.* at 829-30 n.4 (internal citation omitted). In *Tuttle*, moreover, Justice Brennan explicitly rejected mere "but for" causality, invoking at least the limiting principles of tort law. *Tuttle*, 471 U.S. at 833 n.8. Finally, in Part II-B of his opinion in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), concurred in by Justices White, Marshall and Blackmun, he wrote that

> municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 483-84. *See also* George D. Brown, Municipal Liability Under Section 1983 and the Ambiguities of Bur-

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[2] Justice Stevens has consistently rejected *Monell*'s refusal to allow liability under *respondeat superior*. *See, e.g., City of Oklahoma City v. Tuttle*, 471 U.S. at 834-44 (Stevens, J., dissenting).

ger Court Federalism: A Comment on *City of Oklahoma City v. Tuttle* and *Pembaur v. City of Cincinnati*—the "Official Policy" Cases, 27 B.C.L. Rev. 883, 901 (1986).

In all candor, Justice Brennan's requirement of "conscious choice" is susceptible of a very expansive reading. He refers to specific municipal choices on police training, including not only issues going to the *content* of police courses ("when to shoot to kill"), but also such neutral issues as "how much time and emphasis [should] be placed on training in such matters as how to approach felony-in-progress situations." *Tuttle*, 471 U.S. at 829-30 n.4 (Brennan, J., concurring). But this list appears simply to have been identified by plaintiff. *Id.* at 829 & n.4. Justice Brennan cannot be described as committed to the view that neutral municipal police training decisions, short of unleashing officers manifestly incapable of observing constitutional norms, would trigger liability.

Court decisions in closely related areas also warn strongly against imposition of § 1983 liability for misjudgments that at most increase the risk of constitutional violations. In *Rizzo v. Goode*, 423 U.S. 362 (1976), the district court had issued an injunction against municipal officers merely upon a showing of an "unacceptably high" number of unconstitutional acts by their subordinates, *id.* at 373, arguably caused by a departmental "tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct," *id.* at 368-69. The Court refused to countenance this judicial intervention. It contrasted these facts with those of the decision principally relied on by the district court, *Hague v. CIO*, 307 U.S. 496 (1939), in which "liability and injunctive relief were grounded [on] the adoption and enforcement of deliberate policies by the defendants there . . . of excluding and removing the plaintiff's labor organizers and forbidding peaceful communication of their views to the citizens of Jersey City." *Id.* at 374.

In *Rizzo*, by contrast, there was no showing that the "behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere." *Id.* at 375. The Court found that "[n]othing in *Hague* . . . , or any other case from this Court, supports such an open-ended construction of § 1983." *Id.* at 373-74. Although *Rizzo* rested in part on a concern for the ill effects of injunctive intervention in the management of municipal police, it is hard to see that intervention through the imposition of large damage judgments would be materially less intrusive.

In the definition of Due Process, too, the Court has recently rejected the use of federal constitutional norms to supplant state policy on governmental negligence. In *Daniels v. Williams*, 474 U.S. 327 (1986), it held that prison custodians' "lack of due care," far from being an "abuse of power" cognizable under the Due Process Clause of the Fourteenth Amendment, "suggests no more than a failure to measure up to the conduct of a reasonable person." *Id.* at 332. *See also Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (refusing to find due process clause liability under similar facts, even though state law immunities barred plaintiff from any state remedy; "lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent"). The context is of course distinguishable; the Court addressed individual liability for violations of the Constitution's most open-ended provision and expressly left open the possibility that mere negligence might in some cases subject individuals to § 1983 liability under other provisions. *Daniels v. Williams*, 474 U.S. at 334. Indeed, for a claim such as Parker's, that the use of unreasonable force made an arrest illegal under the Fourth Amendment, *individual* liability turns on "an objective standard of reasonableness . . . determined by balancing the infringement of the individual's interest caused by the police action against the governmental interest served." *Martin v. Malhoyt*, 830 F.2d

237, 261 (D.C. Cir. 1987) (§ 1983 action in which court applies standard set forth in *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)). But nothing in *Monell* suggests any reason to suppose the Court intended the sort of close federal judicial control of municipal policy implicit in a rule of liability for a city's negligence in failing to prevent its officers' unconstitutional acts (whatever state-of-mind may be required for *their* liability).

As the majority notes, a Supreme Court analysis of municipal liability for inadequate police training under § 1983 appears imminent. *See City of Canton v. Harris*, No. 85-3314, slip op. (6th Cir. Sept. 5, 1986), *cert. granted*, 56 U.S.L.W. 3601 (U.S. March 7, 1988) (No. 86-1088). The majority and I agree on "deliberate indifference" as the operative words of the likely formula. But one's perception of the force of a definition may depend on his sense both of the difficulty of defining a causal link and of the need for a sharp line between municipal negligence and actions so "abusive" as to invoke the majesty of federal constitutional intervention. Under *Monell* itself, illuminated by such decisions as *Rizzo* and *Daniels*, I think liability can be found only on a showing that municipal policymakers would have thought to themselves: "Yes, we recognize that our police training decisions are bound to generate an exceptionally high number of constitutional violations, but that's just tough." Parker made no such showing here. If the courts are not to federalize much of municipal government policy the courts of appeal must seriously police the border between garden-variety snafus and truly deliberate indifference to low-echelon constitutional violations.

IV. Application of the Standard to the Evidence

In reviewing the District's claims on appeal, we must of course accord the jury great deference, and uphold its verdict unless

> 'there can be but one reasonable conclusion,' drawn from the evidence viewed 'in the light most favorable to the plaintiff[] . . ., giving [him] the advantage of every fair and reasonable inference that the evidence may justify.'

Metrocare v. WMATA, 679 F.2d 922, 924-25 (D.C. Cir. 1982), *quoting Foster v. Maryland State Savings and Loan Ass'n*, 590 F.2d 928, 930 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979). Our review proceeds, howver, without deference to the trial court's denial of the motion for judgment N.O.V. *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 641 (D.C. Cir. 1988). Upholding the verdict below requires the court to decide that a reasonable jury could have concluded that the District's training policies manifested deliberate indifference to any enhanced likelihood of causing constitutional violations and that the alleged deficiencies were the moving force behind the alleged violation. Because of errors in the district court's instructions it is not at all evident that this jury did so find. See part II above. I believe that even with proper instructions, a reasonable jury could not so find. I would reverse.

One further preliminary comment: Many circuits refuse to uphold a finding of deliberate indifference unless the plaintiff can demonstrate a pattern of violations, predating the instant violation, that should have put the municipality on notice that its training policies were dangerously inadequate. *See, e.g., Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 752 (1988); *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir. 1981), *cert. denied*, 456 U.S. 979 (1982); *cf. Rizzo v. Goode*, 423 U.S. 362, 373-77) (in overturning injunction against city officials based on alleged violations by their subordinates, Court relies on absence of any

pattern of violations). *But see Grandstaff v. City of Borger*, 767 F.2d 161, 170-71 (5th Cir. 1985) (proof of multiple incidents of misconduct on night of the incident may indicate that the policemen knew at the time that their actions would "meet with the approval of city policymakers"), *cert. denied*, 107 S. Ct. 1369 (1987); *Kibbe v. City of Springfield*, 777 F.2d 801, 807-08 (1st Cir. 1985) (similar), *cert. granted*, 475 U.S. 1064 (1986), *cert. dismissed*, 107 S. Ct. 1114 (1987). I will assume, *arguendo*, the laxer view—that on some imaginable facts one might find deliberate indifference without a pattern of prior similar conduct.

In order to prevail, Parker had to establish a defect in the District's training program, the requisite state of mind in municipal policymakers with respect to that defect, and a strong causal link between that defect and his constitutional injury. Each alleged training inadequacy must stand on its own. We cannot find the requisite links by combining distinct liability theories in a vague § 1983 goulash. To do so would render the concept of deliberate indifference meaningless and trivialize the causation requirement.

Parker argued five theories to support his § 1983 claim. I address them *seriatim*.

1. *Extrajurisdictional training.* Parker attempted to show that the District inadequately trained its officers as to proper extrajurisdictional arrest procedures and as to their extrajurisdictional arrest authority. A critical aspect of their alleged inadequacy, as the majority opinion's summary makes clear, *see* Maj. Op. at 8-9, was that it *understated* the officers' extraterritorial authority. Had the officers been properly trained as to their authority to make extraterritorial arrests, Parker argues, they would have simply and promptly arrested him. Appellee's Brief at 35-36. (District police officers with probable cause to believe someone has created a felony may make a citizen's

arrest in Maryland. *See Stevenson v. State*, 413 A.2d 1340, 1346 (Md. 1980).) Had they done so, he would not have been made nervous by the drawn-out stalemate, would not have attempted to flee, would not have attempted to hijack a stranger's car, and thus would not have been shot.

Of course it is quite true that the officers' ignorance of their full authority played a role in creating the awkward standoff. But it seems unprecedented to suggest that the issuance of instructions understating officers' authority could manifest deliberate indifference to the constitutional violations that might very indirectly result. On this remarkable theory it is as risky for a municipality to pursue a Milquetoast's strategy as a Rambo's. Parker of course introduced no evidence of a pattern of similar incidents or of any other circumstances that would have alerted District policymakers to the risk that such a knowledge gap carried a special risk of causing constitutional violations. I cannot perceive a basis for inferring the requisite deliberate indifference.

Further, Parker utterly failed to show the necessary causal link. At best, he has demonstrated "but for" causation. This is plainly not enough. *See Tuttle*, 471 U.S. at 833 n.9 (Brennan, J., concurring). Parker's theory minimizes the significance of intervening events and ignores the autonomy of the various players. It depends on the following causal chain: The District's inadequate training program left the officers confused as to their extrajurisdictional arrest authority, which created a tense atmosphere in the Parker home, which made Parker nervous and led him to attempt escape through his bedroom window, which resulted in a chase through the neighboring woods, which led to a confrontation between Parker and Hayes on the street which prompted Parker to attempt to hijack Desrine Rainford's car, which led Rainford to dump her tea on his lap, which caused Parker to reach his hand towards his pant while he was

struggling with Hayes, which gave Hayes the impression that Parker was reaching for a gun, which caused Hayes to shoot him. This out-*Palsgraf*s *Palsgraf*. On such a theory, the want of a nail was "the moving force" behind the kingdom's loss.

Cameron v. City of Pontiac, 813 F.2d 782 (6th Cir. 1987), properly rejected a similarly tenuous causal link. There policemen chased and shot at a fleeing suspect who, in an effort to escape, jumped a fence and sprinted onto a highway, where he was struck and killed by a passing truck. The court found that the policemen's use of deadly force "was not, as a matter of law, the proximate cause of [Cameron's] death." *Id.* at 786. Here, the District's training decisions were far less proximately connected to the ultimate shooting. (The majority seeks to distinguish *Cameron* on the ground that here Hayes's shooting was clearly the proximate cause of Parker's injury. Maj. Op. at 12. But that is not in question. Parker's problem was to show that flaws in the *District's extrajurisdictional training policies* were the moving force behind the shooting.

2. *Adequate warning.* Parker attempted to demonstrate that Hayes's warning to him—"Freeze, Parker, don't do it"—was dangerously imprecise. Even assuming it was negligent of Hayes not to use an affirmative command, like "Put your hands over your head," Parker introduced no evidence as to the District's policy on how officers should warn potentially armed suspects. The jury was not free to infer a municipal policy from a single episode. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Nor do I believe one can find deliberate indifference to constitutional rights in the District's going the "wrong" way—if it is wrong—on such a subtle point of police procedure.

3. *Fitness training.* Parker argued at trial that the District was grossly reckless in not establishing minimum physical fitness standards for officers in its ROP unit.

He claimed that had the District paid heed to fitness it would not have selected Hayes to be on the squad, and that if Hayes had been in reasonable shape he would have been able to handle the arrest without using his revolver.

Whatever the District's actual policies on the fitness of ROP officers, Hayes appears to have been in fine shape. To be sure, Parker did present some testimony as to Hayes's fitness during various time periods considerably prior to November 1982. He established (1) that in 1977 Hayes was unable to continue his SWAT team duties because he had developed a heart condition, pericarditis, (2) that Hayes had received a few citations for being overweight sometime between 1977 and 1982, and (3) that Hayes had suffered a hairline fracture of his right shoulder in July 1982.

While these may be interesting historical facts, none suggests any defect in Hayes's physical condition *at the time of the shooting*. By 1979 Hayes had recovered from his pericarditis well enough to resume extracurricular physical activities. He jogged a couple of miles each day, worked-out in his free time, and participated in martial arts courses and casual athletics. Testimony of Hayes, Tr. at 239. When he applied to join the ROP in 1982, he felt entirely fit for active duty. *Id.* at 1730, 1733.

Hayes did indeed suffer a hairline fracture in July 1982 when another vehicle struck his patrol car. *Id.* at 1734-35. On account of that injury his superiors temporarily relieved him of active duty. *Id.* at 257. By September, however, two months before the present episode, he had recovered fully and was certified as fit by the Board of Surgeons at the Police and Fire Clinic. Testimony of Inspector Spurlock, Tr. 1559; Testimony of Hayes, Tr. 1736. He resumed his duties on the ROP. There, because of his size and strength, he was often designated the "ram person;" *i.e.*, the officer who, when necessary, knocks

down barricaded doors to facilitate police entry. Testimony of Inspector Spurlock, Tr. 1559. There is simply no basis for the canard that Hayes was "not in adequate physical shape." *Cf.* Maj. Op. at 10.

Further, the record contains no support for any finding that the District was deliberately indifferent to the danger posed by its failure to set minimum fitness standards. The only evidence bearing on the District's frame of mind was the testimony of Assistant U.S. Attorney Bowman, one of the founders of the ROP, who admitted that physical fitness probably ought to have been taken into account in officer selection. He attributed the oversight to the planners' assumption that most of the officers' surveillance would be by car. Tr. at 1334. This falls far short of deliberate indifference.

Finally, Parker presented no evidence whatsoever to support the thesis that any possible gap between Hayes's physique and Charles Atlas's was the moving force behind Hayes's failure to subdue him by hand. Acceptance of liability on this theory invites reliance on precisely the sort of rampant speculation and conjecture against which Justice O'Connor warned. *See* p. 13 above.

4. *Disarmanent training.* Parker asserts that if Hayes had received adequate disarmanent training he would have been able to subdue Parker physically, and would not have shot him. Parker organizes his support for this theory carefully, but the resulting structure is rickety indeed. He points to (1) expert testimony that Hayes should have been able to use conventional law-enforcement techniques to remove Parker from the car and render him harmless. Testimony of Bates, Tr. 282; (2) Hayes's deposition statement that his formal training in "hand-to-hand" combat—consisting of two 30-minute sessions in 1972—had been "next to nothing," Tr. 233; and (3) an expert's opinion that if the District had provided its police officers with only one hour of physical disarmament

training, that would have been inadequate. Testimony of McLaren, Tr. 693. All this is not remotely up to the task.

At no time did Parker's experts in fact review or analyse the District's training policy, much less assess it as inadequate. The main expert, Roy McLaren, testified only that *if* Hayes had received *only* two 30-minute sessions in disarming tactics, that would have been inadequate. Tr. 693.

The hypothesis was palpably false. It was founded solely on Hayes's reference to 60 minutes of police training in "hand-to-hand combat." But these 60 minutes were incontestably a small part of Hayes's overall training—the part consisting of *formal* training in how to attempt to physically subdue an attacker who has drawn a knife or gun. Testimony of Hayes, Tr. 234-35. The District presented undisputed evidence of continuous training: reviews at roll call of specific episodes and on-the-job disarmament training. Testimony of Hayes, Tr. 235-36; Testimony of Inspector Spurlock, Tr. 1516, 1529-30; *see also* Testimony of Murphy, Tr. 1942-43 (training provided by the District exceeds that furnished by most other jurisdictions).

In fact the District did not encourage policemen to use bare hands to physically disarm gun- or knife-wielding assailants. In view of the high risks of such activity, it treated martial arts training as supplemental, as providing a resource to be tried only as a last resort if for some reason an officer could not use the threat implicit in his service revolver. Testimony of Hayes. Tr. 234-35. (Had the District emphasized such training, Parker would likely be arguing that it led to the fatal shooting: as a result of such emphasis, Hayes used grappling techniques instead of immediately drawing his revolver and telling Parker to put his hands up.)

Parker's experts evaluated only an incomplete portion of the District's training policy; they never came to grips

with the policy issue of how much to stress hand-to-hand combat; and they provided no basis at all for a judgment that the District's downplaying of such techniques could be reasonably attributed to deliberate indifference to constitutional violations.

5. *Use of Deadly Force.*

The District's policy was to instruct its officers to use deadly force only as a last resort: to save their lives or the lives of innocent persons, or to prevent the escape of a violent felon. Testimony of Inspector Spurlock, Tr. 1513-14; Testimony of Hayes, Tr. 1696-97. Hayes, believing that both his life and Desrine Rainford's were in danger, *id.* at 1806, fired before seeing an actual weapon.

Parker contends that if Hayes had been properly instructed he would have held his fire until he had actually seen a weapon, and his experts so testified. But it is the Supreme Court, not Parker's expert testimony, that defines when a police officer may constitutionally shoot. The Court in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), held that "[w]here [an] officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." It explicitly approved of police department policies that "allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm." *Id.* at 18-19. As the District's policy complies with, and is practically identical to, this standard, the jury was not free to decide that the experts' suggested policy was more to its taste.

Apparently conceding that Parker's attack on the district's "official policy" may be blocked by *Garner*, the majority hints that the jury could have found that the District's *actual* policy was less restrictive than the ap-

parent official one. Maj. Op. at 13. But the facts do not support the hint. The District presented evidence to substantiate its claim that its officers were indoctrinated in its official policy. Testimony of Inspector Spurlock, Tr. 1508-13. Hayes testified that he knew and understood that policy. Tr. 1696-97. Parker introduced no evidence supporting the existence of an alternative "actual" policy.

Of course, the jury could have found that when Hayes fired he could not have reasonably believed that he or Ms. Rainford was in danger. Perhaps it leapt from this to a belief that the District trained its policemen to shoot prematurely. But *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985), plainly forbids the fact-finder to infer a municipal policy from a single action of a non-policy-making employee.

There is a second possibility. Theodore Carr, Assistant Police Chief of the District of Columbia, conducted an official review of Hayes's conduct in the shooting. He determined that Hayes's decision to fire was not justified by the actual danger posed, and he recommended that Hayes be fined and recycled through the firearms training course. Tr. 917-20; Plaintiff's Exhibit 40, 2 Joint Appendix (J.A.) E-4—E-8. Although Chief of Police Turner initially agreed with this assessment of the facts, he later set aside the fine, Tr. 923-24, and Hayes was never put through a firearms retraining program as a consequence of the shooting. *Id.* at 1618. The majority treats the nullification of the fine and failure to retrain as "a telling example" of the inadequacies of the District's discipline and supervision, Maj. Op. at 10, possibly viewing it as evidencing a *de facto* policy in conflict with the official one.

With all respect, the episode tells very little. The department's reprieve appears to have turned on an analysis of Hayes's statements as to what he perceived. *See*

Plaintiff's Exhibit 40, 2 J.A. E-4—E-8. Carr and Turner, as reasonable students of the record, could have reached different appraisals.

Of course one can imagine police conduct so egregious that superiors' complaisance could at least be powerful evidence of a preexisting policy. *See Kibbe v. City of Springfield*, 777 F.2d 801, 806 (1st Cir. 1985), *cert. granted*, 475 U.S. 1064 (1986), *cert. dismissed*, 107 S. Ct. 1114 (1987); *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 107 S. Ct. 1369 (1987). But this is plainly no such case. It is true that to find a violation of Parker's Fourth Amendment rights, the jury had to conclude that Parker was the victim of an unreasonable seizure. But the jury's exoneration of the District on the assault and battery claim entailed the opposite finding—that Hayes had not used unreasonable force under the circumstances. Jury Instructions, Tr. 2220. In response to the district's motion for J.N.O.V., the district court sought to reconcile these findings by suggesting that the jury might have found the shooting unreasonable in an absolute sense, but Hayes's actions reasonable given his lack of adequate training. *Parker v. Hayes*, C.A. No. 83-3382 (D.D.C. Jan. 29, 1987) (Mem. Op.) at 6-7 n.5. Whatever credence one may give this imaginative reconstruction,[3] it seems plain that the

[3] The court's refusal to grant a judgment N.O.V. based on the inconsistency of the jury's verdicts is not before us as an independent claim of error, but it seems plain that the district court's attempted reconcilation presupposes far more refined notions of tort law than exist. While a police officer may be judged as "a reasonable police officer" rather than as a "reasonable person," there is simply no precedent for use of an ultra-subjective standard considering "a reasonable police officer with the specific amount of training this officer received." In any event, it seems fanciful to believe that the jury would, without aid from court or counsel, invent this distinction between § 1983 and common law liability standards. In fact, so far as reasonableness was concerned, the jury instructions for assault and battery were almost identical

jury did not regard Hayes's conduct as so egregious that it could infer deliberate indifference from the District's ultimate judgment call that he should not be penalized. As the jury clearly did not regard it as obvious that Hayes had used unreasonable force, his chiefs' similar judgment cannot be evidence of a preexisting policy of countenancing constitutional violations.

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to those tendered for the § 1983 claim. *Compare* Tr. 2220 ("If you find that the use of that force used by Officer Hayes was unreasonable or excessive under the circumstances, you shall find the District of Columbia liable for assault and battery") with Tr. 2223 (to establish a constitutional violation on which to base his § 1983 claim, Parker must prove that he was injured "as a result of the unnecessary and unreasonable use of force by Officer Hayes"). Whatever affirmative defense Hayes's lack of training might have afforded on the common law claim, no such theory was argued and no instruction to that effect was tendered to the jury.

In its opinion, the district court attempts to distinguish this case from *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). *See* Mem. Op. at 5-6. With all due respect, in so far as *Heller* is relevant to this case, it is on all fours. In *Heller*, also a § 1983 case, a jury had found the defendant police officer's actions not unreasonable and the officer not liable in the first half of a bifurcated trial. As the jury's finding eliminated the requisite constitutional infraction, the district court dismissed the action against the municipality as well and canceled the second half of the proceedings. The court of appeals reversed, holding that the verdict in favor of the policeman did not preclude a verdict against the city on an inadequate training theory. *Heller v. Bushey*, 759 F.2d 1371 1373-74 (9th Cir. 1985). It found, in an argument almost identical to that made by the district court here, "that the jury could have believed that [the policeman], having followed Police Department regulations, was entitled in substance to a defense of good faith." *Id.* at 1373. The Supreme Court, on appeal, disagreed. Because the jury was not charged on any good faith affirmative defense theory, the court of appeals could not employ such a theory to discount the verdict of exoneration. *City of Los Angeles v. Heller*, 475 U.S. at 798-99.

Running a police department raises a variety of hard policy issues. The District may not have resolved each of these perfectly. But even if we assume training errors and a sufficient causal link between them and Parker's injury, there is simply no evidence—from a pattern of excessive constitutional violations or anything else—from which a jury could reasonably infer that its decisions reflected deliberate indifference to increased risks of such violations. The judgment N.O.V. ought to have been granted.

Even if there were sufficient evidence, the district court's failure to give the properly requested *Garner* charge was error and would require remand for a new trial.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 83-3382

DONALD R. PARKER, *et al.*,
Plaintiffs,

v.

WILLIAM HAYES, *et al.*,
Defendants.

ORDER

Before the Court is the defendant's motion for judgment notwithstanding the verdict, or in the alternative, for a set-off of the $39,205.72 cost of D.C. General Hospital treatment for the injured plaintiff. For the reasons set forth below, the defendant's motion is denied.

I. Background

On November 14, 1983, Donald R. Parker and his wife, Betty Parker, brought suit in this Court against the District of Columbia and two District of Columbia police officers, William Hayes and Ronald Motley. In their complaint the Parkers sought compensatory and punitive damages against the defendants for injuries resulting from an altercation with District of Columbia police officers near the plaintiffs' home in Prince Georges County, Maryland. The plaintiffs asserted a variety of legal claims, ranging from constitutional and statutory civil rights violations to assault and battery, negligence, and loss of consortium.

Prior to trial, plaintiffs dismissed all claims against the two individual officers,[1] and before submission to the jury,

[1] Unless otherwise stated and for ease of reference henceforth, "defendant" refers to the District of Columbia and "plaintiff" refers to Donald R. Parker.

further dismissed the claims alleging negligence on the part of the District of Columbia and claims for punitive damages.

Subsequently, after extensive pretrial discovery, a jury was impaneled and the matter went to trial against the District of Columbia only. At the conclusion of plaintiffs' case-in-chief and again renewed at close of all the evidence, the defendant moved for directed verdicts.[2] Those motions were denied and the case was submitted to the jury on two counts: a state law assault and battery claim and a federal civil rights claim. The jury found in favor of the District of Columbia on the state law claim, but against the defendant on the civil rights claim, brought under 42 U.S.C. § 1983, awarding Donald Parker $425,046.67 in compensatory damages and Betty Parker $1.00 in nominal damages for loss of consortium.

The District of Columbia now argues that "since the jury found that Officer Hayes did not use unreasonable force against Don Parker [as to Count I (the state law assault and battery claim)], there is no violation of a constitutional right which is redressable under § 1983 [as a matter of law]." Defendant's Motion for Judgment NOV at 3. In short, the defendant contends that the jury's finding on Count I precludes a judgment against the defendant on Count II. Since the police officer involved in the altercation was found not to have acted with unreasonable and excessive force, the defendant argues, then the District of Columbia cannot be guilty of a constitutional violation and cannot, in that absence, make out a valid section 1983 claim.

Further, the defendant contends even if the verdict on Count I is not ground for judgment NOV on Count II, the

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[2] The District of Columbia principally argued that Officer Hayes did not act unreasonably or with excessive force in shooting Donald Parker and instead acted either in self-defense or in defense of others; and that plaintiffs had not proven that a District of Columbia policy or custom was the moving force that caused the alleged violation of plaintiffs' right to due process of law.

jury verdict must be reversed as a matter of law because the plaintiffs have not and cannot meet the requirements for municipal liability under section 1983 as set forth in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978) and its progency.[3]

II. Preclusive Effect of Count I

Initially appealing, the defendant's effort to link the jury verdict on Counts I and II cannot withstand analysis. The District of Columbia begins by asserting that the "jury's verdict as to assault . . . precludes any finding of a constitutional violation":

> In order for the jury to properly have found a constitutional violation *under the facts of this case*, they would have been obliged to find that Officer Hayes used unreasonable force in shooting Parker. The jury made an express finding to the contrary, that Officer Hayes did not use excessive force. Under the current status of § 1983 law, a policy cannot be deemed "unconstitutional" absent an affirmative *unconstitutional* act. The Supreme Court reaffirmed that not every instance of unreasonable force rises to the level of a constitutional violation. Therefore, reasonable force cannot create the constitutional violation necessary to satisfy section 1983.

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[3] In addition to the arguments summarized above, the defendant reiterates its contention that the plaintiffs' "§ 1983 claim should not lie where there exists an adequate remedy at common law . . . [citing *Parratt v. Taylor*, 451 U.S. 527 (1981)]." Defendant's Motion for Judgment NOV at 10 n.3. This claim has been addressed previously, *see* Order of September 6, 1985 at 3, and need not be discussed again here. During the course of the trial the plaintiffs held steadfastly to their position that the defendant had violated a right to *substantive* due process, not *procedural* due process. *See generally Bell v. Wolfish*, 441 U.S. 520 (1979); *Rochin v. California*, 342 U.S. 165 (1952); *Hall v. Tawney*, 621 F.2d 607 (6th Cir. 1980).

Defendant's Motion for Judgment NOV at 10 (emphasis in original) (citations omitted).

It is well established that consistency in general verdicts is not required. *Dunn v. United States*, 284 U.S. 390, 393-94 (1932) ("[t]hat the verdict may have been the result of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters"); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973). The Supreme Court's 1943 look at this issue applies with similar vitality. *United States v. Dotterweich*, 320 U.S. 277, 279.

> Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty . . . is immaterial. Juries may indulge in precisely such motives or vagaries.

Inconsistent general verdicts may be upheld provided there is evidence to support the finding reached by the jury. There being ample support in the record here to support the jury's verdict on the section 1983 claim, the mere possibility of contradiction in the two verdicts in not a basis for overturning either verdict.[4]

The defendant relies heavily on a recent Supreme Court decision, *City of Los Angeles v. Heller*, 106 S. Ct. 1571 (1986), to argue for a different conclusion. In *Heller* the district court held a bifurcated trial on a section 1983 claim brought against a police officer and a municipality, trying first the constitutional claim against the individual police officer. The jury rendered a verdict in favor of the officer, concluding that no constitutional rights had been violated. Because the constitutional claim against the officer formed the legal basis

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[4] It should not be overlooked that even assuming *arguendo* that the jury's verdicts are inconsistent, the District of Columbia failed to make its objection prior to discharge of the jury, when remedy was still possible, waiving thereby any later objection. *See, e.g., Dickerson v. Pritchard*, 706 F.2d 259 (7th Cir. 1983).

for the constitutional claim against the city, the district court correctly concluded that the verdict in favor of the officer required that the suit against the city could not proceed to trial. In short, in that case, the initial—and only—verdict in favor of the individual on the section 1983 constitutional claim precluded a finding of liability against the city on the same constitutional claim.

Unlike *Heller,* our case involves two general verdicts rendered simultaneously. Count I is dissimilar to the verdict issued in *Heller* for it involves a wholly separate and independent *state* claim. The jury's verdict on the constitutional claim here is not dependent on the first claim because the jury was not asked in Count I to make *any* determination as to whether a constitutional violation had occurred. While the conclusion reached on the single verdict in *Heller* was necessarily conclusive as to both the officer and the city, *see Heller,* 106 S. Ct. at 1573 ("[the city was] sued only because [it was] thought legally responsible for the [officer's] action; if the latter inflicted no constitutional injury on [the plaintiff], it is inconceivable that [the city] could be liable"), here Officer Hayes clearly could have been found by the jury not to have breached a reasonable man standard for assault and battery but nevertheless his employer could appropriately, by a preponderance of the evidence, have been found to have deprived the plaintiff of a constitutional right.[5]

[5] That is, the jury possibly sympathetic to an individual's dilemma in the dramatic tension recounted could have found when examining *only* Officer Hayes' actions that his conduct was not unreasonable given the particular conditions at the time of the shooting, his attested and supported assertion of self defense, and his own lack of training. When assessing the culpability of the District of Columbia, however, the jury could reasonably have found that the shooting was symptomatic of a city policy that was deliberately indifferent to the use of excessive force, and hence constituted a constitutional violation when judged against the standard for officers properly trained in extra-jurisdictional emergencies. In short, activity that might not seem "shocking" when evaluated against the expectations one might hold for an untrained officer, could well appear "shocking" when evaluated against a standard of training and safety that the jury could have concluded the municipality reasonably should have provided.

The defendant's "preclusion" argument is further undercut by its concession in its reply memorandum that, contrary to what appeared to be earlier assertions in the motion for judgment NOV,[6] the state law claim is not inconsistent with the Section 1983 claim:

> Contrary to plaintiff's understanding, defendant has made no argument with regard to any inconsistency of the verdict in this case. Defendant has rather asked the Court to grant a judgment notwithstanding the verdict on count II because defendants are entitled to such a judgment *as a matter of law.*

Reply Memorandum at 1 (emphasis in original).

Although the position taken in the reply memorandum is therefore murky, it suggests that the defendant now believes that the verdicts should not be upheld "as a matter of law" either because the plaintiffs failed to offer sufficient evidence to support the verdict against the District of Columbia reached on Count II, *see Borel,* 493 F.2d at 1094, or because the *Monell* requirements for municipal liability have not and cannot be met. The latter question is addressed in part III *infra.* Only the former issue—sufficiency of the evidence—remains to be addressed within the context of the defendant's "preclusion" argument.

When deciding a motion for judgment NOV, "the jury's verdict must stand unless 'the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict.' " *Murphy v. United States,* 653 F.2d 637, 640 (D.C. Cir. 1981), *quoted in Carter v. Duncan-Huggins, Ltd.,* 727 F.2d 1225,

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[6] "It is clear that since the jury found that Officer Hayes did not use unreasonable force against Don Parker, there is no violation of a constitutional right which is redressable under § 1983. . . . In light of that finding, . . . it is clear that the jury cannot award damages for the injury sustained as a result of the shooting since the shooting, in their minds, was justified." Motion of Defendant for Judgment NOV at 3.

1227 (D.C. Cir. 1984). A motion for judgment NOV will be denied unless

> 'there can be but one reasonable conclusion' drawn from the evidence viewed 'in the light most favorable to the plaintiffs . . ., giving them the advantage of every fair and reasonable inference that the evidence may justify.'

MetroCare v. Washington Metropolitan Area Transit Authority, 679 F.2d 922, 924-25 (D.C. Cir. 1982), *quoting Foster v. Maryland State Savings and Loan Ass'n*, 590 F.2d 928, 930 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979).

The jury was instructed that in order to find a violation of section 1983, it must conclude that "the District of Columbia failed adequately to train, supervise and discipline" and that this failure constitutes gross recklessness and gross indifference to the civil rights of Mr. Parker . . . ." [Sic] Prior to submission to the jury of Count II, the Court ruled affirmatively on the sufficiency of plaintiffs' evidence. A review of this matter, in consideration of the instant motion, reaffirms those rulings.

Here it is clear that the evidence submitted at trial was neither "so one-sided" as to preclude disagreement between reasonable men nor so overwhelming as to permit "but one reasonable conclusion." Two witnesses, Charles Bates and Roy McLaren, testifying as experts on police procedures, stated that the Repeat Offender Project (ROP) to which Officer Hayes was assigned suffered from specific and serious training inadequacies. William Brownlee, an expert in forensic pathology, testified that the gunshot wounds on Parker's body indicated that Officer Hayes had a clear, frontal view of Parker at the time he shot. While Hayes testified to his belief that Parker was armed at the time, other evidence could reasonably have lead a juror to conclude that Parker (who was unarmed) was the victim of excessive force. Officer Hayes himself testified that he received little in the way of disarmament training, and an internal memorandum

revealed that the reviewing representatives in the police department concluded that the shooting was unjustified. Additional expert testimony indicated that Officer Hayes' unit received no training in arrest authority and no clear supervision or training on the proper manner for handling extra-jurisdictional arrests. Given the obvious potential risk of death, or serious bodily injury to the public that could arise from lack of supervision and control in the field, joined with the policy instruction to the officer to be "innovative", and further given the police department's ultimate decision to rescind punishment of Hayes for his shooting of Parker, a fact known to the jury, it cannot be said unreasonable for the jury to conclude that the District of Columbia's inadequate ROP training and supervision policy was grossly reckless and/or grossly indifferent to the constitutional rights of the plaintiff.

III. The Monell Requirements for Municipal Liability

In *Monell v. New York City Dep't of Social Services,* 436 U.S. 658, the Supreme Court ruled that a municipality could be sued under 42 U.S.C. § 1983 provided that it was the "execution of a government's policy or custom" that was responsible for inflicting the constitutional injury:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694. Summarized briefly, to find municipal liability *Monell* requires that there be (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Id.; Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985).

The defendant now argues that the verdict on Count II must be overturned because the plaintiffs have not, and cannot, satisfy any of those four requirements.

A. The District's Policymaker

At trial the plaintiffs introduced evidence that Inspector Edward J. Spurlock organized the squad unit to which Officer Hayes belonged. Spurlock testified that Police Chief Maurice Turner gave him full authority to organize, staff and train the officers in Hayes' unit. The defendant contends that these individuals do not constitute "policymakers" for purposes of the *Monell* analysis:

> Plaintiff has made no showing that a city policymaker, i.e., here the Mayor or the City Council, was the "person" who, acting for the District of Columbia, caused plaintiff to be subjected to the alleged violation of his constitutional right.

Defendant's Motion for Judgment NOV at 12.

Since the defendant filed its motion for judgment NOV the Supreme Court has directly addressed the question of who may constitute a policymaker under *Monell*. In *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986), the Court ruled that "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level":

> *Monell's* language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell, supra*, 436 U.S. at 694, 98 S. Ct. at 2037-2038, and whose decisions therefore may give rise to municipal liability under § 1983.

Id. at 1298-99. Municipal liability "attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered," *id.* at 1299, but the authority to make municipal policy "may be delegated by an official who possesses such authority." *Id.*

at 1300. Applying this standard to the facts before it, the Court concluded that a county prosecutor had been delegated final authority over county police actions sufficient to find the county liable under section 1983.

Here, uncontested evidence was presented that Chief Turner gave Inspector Spurlock full authority to organize, design, and set policy for the ROP squad. The power to delegate this authority over Hayes' squad stemmed in the first instance from the plenary power accorded Chief Turner by the Mayor for the purpose of operating the police department. The delegation that occurred here is not unlike that in *Pembaur*. Under the circumstances the jury could have legitimately concluded that Inspector Spurlock exercised final authority over ROP squad policy in a manner that "may fairly be said to represent official policy." *Monell*, 436 U.S. at 694.

B. **Establishment of a Legally Sufficient Municipal Policy**

The defendant contends that "in light of *Monell* and post-*Monell* decisions, plaintiff must allege and prove that the actions of the individual police officers were taken as a result of an unconstitutional policy or from a systematic pattern or failure on the part of the District of Columbia to promulgate appropriate training." Defendant's Motion for Judgment NOV at 13-14. In this instance, the defendant argues, "The expert testimony offered by plaintiffs in no way satisfied the burden of proof required to support an allegation of constitutional deprivation as the result of custom or policy . . . . Mr. Parker cannot show a pattern of similar incidents, by Hayes or other officers, nor can he show that there was a pattern of gross or reckless disregard of rights by Officer Hayes or others, such that the City may be held liable under § 1983." In the defendant's view, the Supreme Court's recent decision in *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985), requires that the plaintiff establish that the constitutional injury resulted from more than a single incident, that the city's policy itself is unconstitutional,

and that the municipal policy evinces a *conscious* or *deliberate* lack of concern for the rights of the plaintiffs and other similarly situated individuals. The defendant reasons that at maximum the District of Columbia's police training policy demonstrated that the District was guilty of unintentional negligence, not conscious or deliberate indifference.

When read in conjunction with other recent case law, *Tuttle* does not support the defendant's position. The *Tuttle* Court reversed the trial court's finding of municipal liability not because the plaintiff established only a single incident of excessive force by a police officer, but because the trial court's instruction permitted the jury to find the city liable "without submitting proof of a single action taken by a muncipal policymaker." In short, the jury was instructed that it could find municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers. In the absence of direct proof of such a connection between a policymaker and the activity, the Court concluded that considerably more evidence was needed than the existence of a single incident to establish the required causal link.

> . . . where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.

Tuttle, 105 S. Ct. at 2436 (footnotes omitted).

In *Pembaur* the Supreme Court effectively limited the scope of the *Tuttle* ruling by adding that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances":

> No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy.

Pembaur, 106 S. Ct. at 1298.

Regardless whether one reads *Tuttle* expansively or interprets *Pembaur* as limiting the scope of applicability of the "single incident" language in *Tuttle*, the plaintiffs in this case submitted more than sufficient evidence to satisfy the requirements. This Court specifically instructed the jury that it could not find inadequate training based on a single incident of unreasonable force. The shooting of plaintiff Parker, which the plaintiffs' experts linked directly to the inadequate level of training given to ROP officers, was not the sole evidence for a jury to find "deliberate indifference." Additionally, there was evidence of the frequency with which ROP members had to confront potential arrestees in and out of the District and, in particular, the attempts to effect extra-jurisdictional arrest [sic] in the face of confusing advice. Here, the plaintiffs demonstrated through evidence that final decisionmaking authority was delegated from the Mayor, through the police chief, to Inspector Spurlock as director of the ROP unit, and that police officers in the ROP unit received "next to nothing" in disarmament tactics and extra-jurisdictional arrest procedures. There was also testimony as to the relative ease and inexpense involved in producing appropriate police instruction. The plaintiffs further submitted evidence indicating the District of Columbia was aware that without adequate training one of its officers (Hayes) had acted in a manner considered unjustified by the investigatory police unit yet consciously elected, through the police chief, to override that determination and not take substantive remedial or punitive action on behalf of the ROP unit or the officer, respectively. The jury reasonably could have concluded from this "ratification" evidence that the city maintained a policy of "conscious disregard" for the training of its officers and the rights of its citizens. In short, the jury had more than a "single incident" upon which to base its verdict against the District of Columbia.

Indeed, the evidence offered at trial to establish a municipal policy of deliberate indifference was not unlike that

used to establish a similar policy in *Grandstaff v. City of Borger*, 767 F.2d 161, and in *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986). In *Grandstaff*, the Fifth Circuit concluded that "the disposition" of the policymaker could be inferred from actions taken (or not taken) after the incident of policy [sic] misconduct occurred:

> . . . Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things were done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do on August 11, 1981 was not acceptable to the police chief, changes would have been made.
>
> This reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his disposition prior to August 11. . . .
>
> . . . If the police chief had not known and approved of [the dangerous recklessness] beforehand, we would expect a change when he, too, learned the facts. But there is no sign of any concern except that the City avoid liability. The jury was entitled to infer that the conduct on the 6666 Ranch demonstrated the policy of the Borger city police force as approved by its policymaker. . . .

767 F.2d at 171-172. In *Fiacco*, 783 F.2d at 326, the Second Circuit ruled that the plaintiff had properly supported a claim of "deliberate indifference" by offering evidence which pur-

ported to show that the defendant city had failed to exercise reasonable care in investigating claims of police brutality:

> [Fiacco's theory] is that the City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and that this indifference was demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force. We see no logical flaw in such a hypothesis, and we reject the motion [sic] advanced by the City defendants that a municipality may not be held liable under § 1983 on the basis of a policy of deliberate indifference to the constitutional rights of persons within its domain.

In each of these cases the jury was allowed to find against the defendant municipality on the basis of evidence of a single decision by a municipal policymaker not to exercise reasonable care[7] after an incident of constitutional deprivation had occurred. In short, these cases support the interpretation of *Tuttle* noted above. Here, the jury was entitled to conclude from the "ratification evidence" and other evidence noted above that, even in the absence of multiple incidents of constitutional deprivation, the District of Columbia maintained a policy of "deliberate indifference" for which it could be liable.

In addition to the "multiple incident" argument, the defendant challenges the legal sufficiency of the jury's verdict on Count II by arguing that a policy not itself unconstitutional can never provide a basis for § 1983 liability. This argument was analyzed at length in *Fiaccio* [sic] and rejected:

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[7] Police Chief Turner's decision to rescind the reprimand of Officer Hayes was expressly stated to be a "final action." As such it clearly established District of Columbia policy within the meaning of *Pembaur*, and could, under appropriate circumstances, expose the District of Columbia to liability under § 1983. *See generally, Pembaur*, 106 S. Ct. at 1289-99.

Nor are we persuaded by the City defendants' suggestion that a municipal policy that is not itself unconstitutional but that merely permits or tolerates unconstitutional acts by city employees cannot be the basis for municipal liability under § 1983. For this argument the City defendants rely on a footnote in the plurality opinion in *Tuttle*, in which four Justices "express[ed] no opinion on whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the 'policy' requirement of *Monell*." *Id.* at 2436 n.7. Notwithstanding this reservation of view, we think the text of the plurality opinion implies that a policy that is not itself unconstitutional may provide the basis for municipal liability. The question resolved in *Tuttle* was whether the existence of a policy could be inferred solely from evidence of the occurrence of a single incident, and the Court held that more evidence was required. In reaching this conclusion, the plurality opinion noted the plaintiff's contention that there was in the record additional evidence of an official policy of inadequate training but stated that "unfortunately for [plaintiff]," the court had instructed the jury that it could infer the existence of such a policy solely from evidence of the occurrence of the single incident, without any additional evidence. *Id.* at 2435. The implication of the word "unfortunately" would seem to be that if the jury had not been allowed to infer the existence of the alleged policy—itself not unconstitutional—solely from the occurrence of the single incident, the four Justices who joined this opinion would have upheld the judgment in favor of the plaintiff. Further, in emphasizing that proof of the occurrence of a single incident is not sufficient to establish the existence of an official policy, the plurality opinion went on to state that "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish . . . the requisite fault on the part of the municipality . . . ." *Id.* at 2436 (footnote 7 omitted). The concurring opinion in *Tuttle* indicates that three other Justices would have

upheld the judgment for the plaintiff if it had been clear that the jury's finding that there was a policy of inadequate training was based at least in part on the other evidence and not just on the evidence of the occurrence of the single incident there at issue. *See id.* at 2438 (Brennan, *J.*, concurring). Thus, notwithstanding the plurality's reservation, it is difficult to conclude that the Court would rule that, as a matter of law, a policy that is not itself unconstitutional may not be a premise for municipal liability under § 1983.

Nor do we think there is a sound basis for a rule of law that would preclude the premising of municipal liability under § 1983 on any policy that is not itself unconstitutional. A municipality that has the responsibility to keep order and to protect the rights of those within its boundaries to be free from physical violence gives its policemen considerable power to subdue persons who would violate those rights. It cannot responsibly condone police officers' use of the power in a way that is itself lawless. It should not take a laissez-faire attitude toward the violation by its peace officers of the very rights they are supposed to prevent others from violating. A principle that would give a municipality immunity from § 1983 liability for injury caused by its deliberate indifference to its police officers' use of excessive force in violation of constitutional principles would foster the denial—both by policemen and by civilians—of the very rights the city is responsible for safeguarding.

783 F.2d at 326-27. This Court finds the analysis persuasive and, accordingly, adopts it for purposes of this case.

C. Proof of Causation

Finally, the District of Columbia contends that the plaintiffs' evidence was insufficient to show that the inadequate training of members of the ROP unit was the "moving force behind" the constitutional injury that plaintiff Donald R. Parker suffered. As discussed *supra*, the evidence provided a clear and reasonable basis upon which a juror could reasonably conclude that lack of training was reponsible for

the incident on Bock Road. The plaintiffs' experts testified that ROP members received inadequate training in disarmament and extra-jurisdictional arrest procedures. One expert testified that Officer Hayes had sufficient time to see that plaintiff Parker was warned before discharging his weapon. As noted above, the jury logically could have concluded that Officer Hayes acted reasonably given his lack of training (and therefore was not accountable on the assault and battery count), but that had he received adequate training the shooting on Bock Road would not have occurred. This Court told the jury that:

> At the very least, there must be an affirmative link between the policy and the particular constitutional violation alleged. The policy must be the moving force behind the alleged constitutional violation.

If the jury accepted the evidence in the record and evaluated as credible the testimony of plaintiffs' experts, then the verdict on Count II is wholly consistent with the plaintiffs' contention that the District of Columbia's policy of deliberate indifference "caused" the constitutional deprivation.

IV.

Accordingly, for the reasons set forth above the defendant's motion for judgment NOV is denied.

Insofar as the District of Columbia has not previously sought set-off, nor requested a reduction from the jury to cover medical bills, nor offered any evidence to suggest that Donald R. Parker will evade his debts for medical care, the defendant's alternative request for a set-off is denied.

IT IS SO ORDERED.

/s/ Joyce Hens Green

JOYCE HENS GREEN
United States District Judge

JANUARY 29, 1987

[FILED JANUARY 29, 1987]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

No. 87-7039

DONALD R. PARKER, *et al.*

v.

DISTRICT OF COLUMBIA, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA and WILLIAMS, *Circuit Judges*, and GORDON*, *Senior District Judge*, U.S. District Court for the Eastern District of Wisconsin.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: JUNE 17, 1988
Opinion for the Court filed by Senior District Judge Gordon.
Dissenting opinion filed by Circuit Judge Williams.
*Sitting by designation pursuant to 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

No. 87-7039

DONALD R. PARKER, *et al.*

v.

WILLIAM HAYES, *et al.*
DISTRICT OF COLUMBIA, *Appellant*

Before: MIKVA and WILLIAMS, *Circuit Judges,* and MYRON L. GORDON*, *Senior U. S. District Judge.*

ORDER

Upon consideration of appellant's Petition for Rehearing, filed July 18, 1988 it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
For The Court

CONSTANCE L. DUPRE, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Williams would grant the petition for rehearing.

*of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S. [C.] § 294(d).

[FILED: AUGUST 18, 1988]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

No. 87-7039

DONALD R. PARKER, *et al.*

v.

WILLIAM HAYES, *et al.*
DISTRICT OF COLUMBIA, *Appellant*

Before: WALD, *Chief Judge*, ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges*.

ORDER

Appellant's Suggestion for Rehearing *En Banc* has been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellant's suggestion is denied.

Per Curiam
For The Court

CONSTANCE L. DUPRE, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Starr, Silberman, Buckley, Williams and Sentelle would grant the suggestion for rehearing *en banc*.

Circuit Judge D. H. Ginsburg did not participate in this order.

[FILED: AUGUST 18, 1988]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 83-3382

DONALD R. PARKER AND BETTY PARKER,
Plaintiffs,

v.

DISTRICT OF COLUMBIA,
Defendant.

JUDGMENT ON THE VERDICT

This cause having been tried by the Court and a Jury, before the Honorable Joyce Hens Green, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the Jury found that the [sic] Officer Hayes did not use unreasonable and excessive force against Don Parker on the plaintiff's claim of Assault and Battery,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Jury found that the District of Columbia had a policy, custom or practice which directly resulted in the deprivation of Don Parker's constitutional right without due process of law on the plaintiff's claim of Violation of Constitutional Rights — Due Process,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Jury awarded the plaintiff Don Parker the sum of Four Hundred Twenty-five Thousand Forty-six Dollars and Sixty-seven Cents ($425,046.67) on the afore named findings of the jury,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the jury found that Betty Parker did not

sustain any loss of consortium as a result of the injuries to Don Parker on the plaintiff's claim of Loss of Consortium — Betty Parker,

AND IT FURTHER ORDERED, ADJUDGED AND DECREED that the Jury awarded the plaintiff Betty Parker the sum of One Dollar ($1.00) on the afore named findings of the jury.

JAMES F. DAVEY, *Clerk*

/s/ BY: Joe A. Wood, Jr. Oct. 3, 1985
Deputy Clerk

APPROVED: /s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

OCTOBER 3, 1985

[FILED: OCTOBER 3, 1985]